IN THE

Supreme Court of the United States

October Term, 1977

No. 77-491

MORRIS B. MYERS

Petitioner,

v.

JOSEPH M. BUTLER AND ELLSWORTH E. EVANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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MISCELLANEOUS

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on May 2, 1977, in Appeal No. 76-1903 entitled Morris B. Myers, plaintiff, v. Joseph M. Butler and Ellsworth E. Evans, defendants.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 556 F. 2d 398 and is reprinted at Appendix A. The judgment of the United States District Court for the District of South Dakota is reprinted at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A) is dated and was entered May 2, 1977. Application for rehearing was denied by order dated and entered June 28, 1977 (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. In this legal malpractice case, in which petitioner claims respondents were negligent in failing to assert in defense of an embezzlement prosecution in a motion for directed verdict at the close of the state's case-in-chief, that the money claimed embezzled was loaned to petitioner, the court of appeals affirmed the judgment of the district court granting respondents' motion for directed verdict; it did so without reference to the facts and the evidence, and without citation of authority. It thus decided an important state question in conflict with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court as to call for an exercise of the Court's power of supervision.

The principle question for review is whether the court of appeals properly reached the conclusion that

> "Contrary to the appellant's (petitioner) contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of the evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve the factual disputes and that the jury had obviously rejected appellant's version.

> "The Court has carefully reviewed the record and is left with the definite conclusion that appellees acted competently and ably at appellant's trial. The record fails to support allegation that appellees did not raise all feasible issues on appellant's behalf." (Appendix A)

2. In a second count petitioner asserted a breach of warranty claim against respondents based upon the failure of a promised result in a plea bargaining situation to materialize. The claim was introduced not only for its substantive worth but so that petitioner's claim for damages for incarceration would not be diminished by the sentence to confinement ordered in the abortive plea bargain proceedings to be served concurrently with the sentence on the embezzlement conviction. The court of appeals held the claim to be without merit.

Question presented: Where, in judicial "plea bargain" proceedings, counsel for the accused has promised or warranted a particular result, and in reliance thereon and to satisfy purely formal requirements, the accused participates with court and counsel in the ritual's litany, is the accused thereafter estopped to claim damages for the unfulfilled promise?

Of course a resolution of this issue centers upon the Court's willingness at reproof. The Court has officially smiled on the judicial lie of the plea bargain and much has been written on the subject (e.g., Ann Strick, *Injustice for All*, G. P. Putnam's Sons, New York, 1977; excerpt at Appendix D). Argument and authority on this question will not be forthcoming in this petition; but no abandonment of the question should be inferred from such omission.

STATUTES AND REGULATIONS INVOLVED

In pertinent part, the following statutes and regulations are involved in this petition:

31 C.F.R. 315.5:

> • • • No designation of an attorney, agent, or other representative to request or receive payment on behalf of the owner or a coowner, nor any restriction on the right of the owner or a coowner to receive payment of the bond or interest, • • • may be made in the registration or otherwise • • •.

31 C.F.R. 315.7:

> Authorized Forms of Registration. — (a) Natural persons. — • • •(3) Beneficiary form — two persons (only). Examples: John A. Jones 123-45-6789 payable on death or Mrs. Ella S. Jones.

31 C.F.R. 315.15:

> • • • Savings bonds are not transferable and are payable only to the owners named thereon, • • •. A savings bond may not be hypothecated, pledged as collateral, or used as security for the performance of an obligation, • • •.

31 C.F.R. 315.35:

> • • • Payment of a savings bond will be made to the person or persons entitled thereto under the provisions of these regulations upon presentation and surrender of the bond with an appropriate request for payment, • • •. Payment will be made without regard to any notice of adverse claims to a bond and no stoppage or caveat against payment in accordance with the registration will be entered.

31 C.F.R. 315.36:

> • • • (e) • • • An owner who has presented and surrendered a savings bond • • • for payment, with

> an appropriate request for payment, may withdraw such request if notice of intent to withdraw is given to and received by the same agency to which the bond was presented prior to the issuance of a check in payment of the Treasury Department or a Federal Reserve Bank, • • •.

31 C.F.R. 315:38:

> • • • A request for payment of a bond must be executed on the form appearing on the back of the bond • • •. • • • adding in the space provided the address to which the check issued in payment is to be mailed. • • • No request signed in behalf of the owner or person entitled to payment by an agent or a person acting under a power of attorney will be recognized by the Treasury Department, • • •. (d) • • • — After the request for payment has been signed by the owner, the certifying officer should complete and sign the certificate following the request as provided in Sec. 315.39(a).

31 C.F.R. 315.39(a):

> • • •, after the request for payment has been duly signed by the owner and certified the bond should be presented and surrendered to (1) a Federal Reserve Bank or Branch, • • •. Payment will be made by check drawn to the order of the registered owner • • • and mailed to the address given in the request for payment.

31 C.F.R. 360.1:

> • • • The regulations • • • prescribe the requirements for endorsement, and the conditions for payment, of checks, drawn on the Treasurer of the United States.

31 C.F.R. 360.4:

> • • • The presenting bank and the indorsers of a check presented to the Treasurer for payment are

deemed to guarantee to the Treasurer that all prior indorsments are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasurer, in addition to other warranties, that the person who so indorsed had qualified capacity and authority to indorse the check in behalf of the payee.

31 C.F.R. 360.5:

• • • The Treasurer shall have the right to demand refund from the presenting bank of the amount of a paid check if after payment the check is found to bear a forged or unauthorized indorsement, • • •.

31 C.F.R. 360.8:

• • •(a) General requirements. — Checks shall be indorsed by the payee or payees named, or by another on behalf of such payee or payees as set forth in this part. The forms of indorsement shall conform to those recognized by general principles of law and commercial usage for the negotiation, transfer, or collection of negotiable instruments. (b) • • • When a check is credited by a bank to the payee's account under his authorization, the bank may use an indorsement substantially as follows: "Credit to the account of the within-named payee in accordance with payee's or payees' instructions, Absence of indorsement guaranteed, XYZ Bank." A bank using this form of indorsement shall be deemed to guarantee to all subsequent indorsers and to the Treasurer that it is acting as an attorney in fact for the payee or payees, under his or their, authorization. • • •

31 C.F.R. 360.12:

• • • Any check may be negotiated under a specific power of attorney executed after the issuance of the check and describing it in full. • • • checks • • •

may be negotiated under a special power of attorney (i) naming a banking institution or trust company as attorney in fact, (ii) limited to a period not exceeding twelve months, and (iii) reciting that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney in fact or to any other person.

South Dakota Compiled Laws:

SDCL Ann. 22-38-3:

If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement.

SDCL 23-45-5:

At any time after the evidence on either side is closed, the court may, upon motion of the defendant, direct the jury to return a verdict of acquittal, and in the event of the failure of the jury to return such a verdict of acquittal the court may refuse to receive any other verdict and may discharge the jury and enter a judgment of acquittal.

SDCL 43-37-2:

If the borrower agrees to return at a future time a similar thing instead of the identical thing borrowed, the loan is a loan for exchange.

SDCL 23-37-9:

A loan for exchange transfers title to the thing and the borrower is entitled to all its increases during the loan period.

STATEMENT OF THE CASE

Introduction

This is a legal malpractice case. A claim of petitioner in the case is the failure of the respondents to assert a defense in criminal proceedings brought against petitioner by the State of South Dakota that would have required petitioner's acquittal. The present litigation is an example of the often criticized calibre of defense lawyer in this country and thus warrants the attention of this Court to provide incentive for improvement through the sanction of the civil remedy for damages.

Without reference to the facts or evidence, and without citation of authority, the Court of Appeals affirmed the judgment of the District Court of South Dakota granting respondents' motion for directed verdict. Petitioner contends the opinion and judgment were rendered not because of the legal principles or facts involved, these were simply ignored, but because it had determined not to emphasize the inadequacies of the criminal defense Bar and to protect two of its members from damage claims and other consequences of their incompetence.

Technical Facts

On January 8, 1970, the Farmers and Merchants Bank, of Aberdeen, South Dakota, loaned petitioner $4035.60 for which petitioner gave his unsecured promissory note due in thirty days (Appendix E). The proceeds of the loan and note were credited to petitioner's personal checking account the following day and were thereafter drawn out and spent by petitioner for his own purposes. On September 11, 1972, an indictment was returned in Brown County, South Dakota, charging petitioner with the crime of embezzlement under SDCL 22-38-3 as follows (omitting formal parts):

> "That Morris B. Myers, on or about the 9th day of January, 1970, in Brown County, South Dakota, while being an attorney duly licensed to practice law in South Dakota, had under his control certain property for the use of another person, to wit: cash in excess of $50.00, said property being entrusted to him by Jeannette Zick, and he did then and there fraudulently appropriate said property to a use or purpose not in the due and lawful execution of his trust contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

Petitioner retained respondents to defend him by payment to them of $20,000 cash. Trial to a jury resulted in a conviction. At the trial the state's contention was that petitioner embezzled the money loaned to him by the Farmers and Merchants Bank on January 8, 1970. Even so, the respondents did not move for a directed verdict at the close of the state's case-in-chief and assert the loan defense. Petitioner's sentence of two years confinement in the state penitentiary was affirmed on appeal (Appendix F). This action, with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, followed in the United States District Court, District of South Dakota. One of the allegations of negligence in the amended complaint is that:

> "* * * at the close of the state's case-in-chief * * * defendants (respondents) failed to move the court for a directed verdict on the grounds that the money claimed to have been embezzled by plaintiff (petitioner) was in fact and law loaned or advanced to plaintiff by the Farmers and Merchants Bank of Aberdeen, South Dakota, and belonged to plaintiff * * *."

At the embezzlement trial these additional facts were elicited by the state in its case-in-chief. On January 8, 1970, petitioner was a practicing attorney at Aberdeen,

South Dakota. On that day, a client, Jeanette Zick (sometimes Jeanette Dennert), signed the requests for payment on each of eight Series "E" U.S. Savings Bonds registered to Herman Weismantel, payable on death to Jeanette Zick, and handed them to petitioner with instructions that they be surrendered for redemption (Herman Weismantel was the grandfather of Jeanette Zick; he died in 1963). Later that day petitioner delivered the bonds to Dennis Christensen, vice-president of the Farmers and Merchants Bank, who, at petitioner's request, guaranteed the signature on each of the bonds. On January 9, 1970, Mr. Christensen forwarded the bonds to the Federal Reserve Bank in Minneapolis for redemption. On January 15, 1970, in consideration of the redemption, the Federal Reserve Bank issued U.S. Treasury check to Jeanette Zick for $4035.60 and mailed it to her in care of the Farmers and Merchants Bank. Jeanette Zick never received the check; it was intercepted by the Farmers and Merchants Bank on January 16, 1970, and on that day was endorsed by the bank

> "Credited to the account of the within named payee in accordance with payee's instructions. Absence of endorsement guaranteed. The Farmers and Merchants Bank, Aberdeen, SD.".

Jeanette Zick did not authorize the endorsement; she did not maintain an account with the bank and had not designated it as her attorney-in-fact to negotiate U.S. Treasury checks. The bank presented the check for payment and in due course received from the Federal Reserve Bank an amount equal to that for which the check was issued.

At the embezzlement trial, in their motion for directed verdict made at the close of all the evidence, their requests to charge, and their objections and exceptions to the court's instructions, respondents did not raise or assert the loan

defense. Significantly, the court did not instruct the jury that if it found the money claimed to have been embezzled by petitioner was loaned to him then it should acquit, nor did respondents request the court to so instruct the jury. Moreover, "loan" or "borrow" is nowhere mentioned in the respondents' requests to charge or in the court's instructions. In the appeal that followed respondents further failed to assign error upon, or brief, the loan defense issue.

Petitioner sought post-conviction relief in state court and a writ of habeas corpus in federal court. In each the principle ground urged was that petitioner was denied due process and equal protection in that there was no evidence to support the conviction. The state court refused relief on the ground that the loan defense had been submitted and decided. Petitioner's application for certificate of probable cause to appeal was for the same reason denied. At the time of filing the application for writ of habeas corpus petitioner's sentence had been commuted; he was therefore not "in custody" and the application was denied.

REASONS FOR GRANTING THE WRIT

A FAIR READING OF THE RECORD COMPELS THE CONCLUSION THAT PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW.

No identification is possible between what the record discloses and what the court of appeals opinion conveys. Facts and law are arbitrarily ignored, and, in error, the court of appeals devised its opinion. The error is gross and obvious, an arbitrary action of the court of appeals resulting in a deprivation of petitioner's property without due process of law (Roberts v. New York, 295 U.S. 264, 79 L. ed. 1429, 55 S. Ct. 689).

Although the court of appeals did not explain the basis of its disposition, reasonable men cannot differ on a record such as was made here. The case, postured as in this petition, i.e., limited to the claim of negligence based upon respondents' failure to raise the loan defense in a motion for directed verdict of acquittal at the close of the state's case-in-chief, no factual disputes exist for resolve by the jury and the motion would have been granted as presenting only a question of law. The evidence introduced by the state in its case-in-chief (Appendix "E") is undisputed and subject to no differing versions for resolve by the jury. The character of the money for purposes of determining the criminality of petitioner's actions with respect thereto, was transfixed; it was loaned to petitioner, was owned by him (SDCL §§ 43-36-2 and 43-37-9) and could not be embezzled by him. (*State v. Kari* (Mont., 1915), 149 P. 956; *Foster v. State* (Ohio, 1930), 175 NE 713; *Commonwealth v. Mithneck* (Pa., 1938), 198 A. 463; *Pearl Assurance Co. v. National Insurance Agency* (Pa., 1943), 30 A2d 333; and *Commonwealth v. Bixler* (Pa., 1922), 79 Pa. Super. 295). The character of the thing claimed embezzled is a question of law, *U. S. v. Collins* (CCA 9th), 464 F2d 1163.

Petitioner's only effective remedy for violation of his right to due process is to seek review by this Court.

CONCLUSION

This case presents an instance of total and arbitrary deference by a court of appeals to the interests of two members of its Bar, the respondents. In the disposition here complained of, no consideration was given to the interests of dispensing justice and the attainment of sound decisions on the merits. At no stage in the proceedings in which petitioner was represented by respondents was

the loan defense tendered to or considered by the court. This absolute void notwithstanding, the court of appeals held that respondents raised all feasible issues on petitioner's behalf even though the record is clear that they did not assert the loan defense which would have resulted in petitioner's acquittal. The case should be remanded for trial to a jury on the issues as framed by the pleadings.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1903

MORRIS B. MYERS,

Appellant,

v.

JOSEPH M. BUTLER AND
ELLSWORTH E. EVANS,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: April 12, 1977
Filed: May 2, 1977

Before LAY and HENLEY, Circuit Judges, and NANGLE, District Judge*

PER CURIAM.

Morris B. Myers appeals from a final judgment entered pursuant to a directed verdict granted at the close of appellant's case. Appellant had brought suit, with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, alleging professional negligence and breach of warranty on the part of appellees. These claims were based on appellees' representation of appellant in state criminal proceedings.

Appellant, who had been an attorney, was charged by indictment in 1972 with the crime of embezzlement; ap-

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*JOHN F. NANGLE, District Judge, Eastern District of Missouri, sitting by designation.

pellant was also charged by information with the misdemeanor of transferring property to defraud creditors. Appellant was convicted of the embezzlement charge, following a jury trial. This conviction was appealed and upheld. *State v. Myers,* 220 N.W.2d 535 (S.D. 1974). Post-conviction relief was denied. Appellant thereafter pleaded guilty to the charge of transferring property to defraud creditors. Appellant contends that appellees were negligent in that they failed to properly present at the trial and appellate levels the defense that the money which appellant allegedly embezzled was, in fact, a loan to him and, accordingly, could not sustain a charge of embezzlement.

In connection with the alleged breach of warranty, appellant contends that appellees warranted that appellant would not receive a term of imprisonment if he pleaded guilty to the charge of transferring property to defraud creditors. Appellant, however, was sentenced to one year imprisonment, said sentence to run concurrently with the sentence received pursuant to the embezzlement conviction.

The facts underlying the embezzlement charge are set out fully in *State v. Myers, supra* at 537-38. Contrary to the appellant's contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve the factual disputes and that the jury had obviously rejected appellant's version.

The Court has carefully reviewed the record and is left with the definite conclusion that appellees acted competently and ably at appellant's trial. The record fails to support any allegation that appellees did not raise all feasible issues on appellant's behalf.

Appellant's claim that appellees warranted that there would be no term of imprisonment were appellant to plead guilty to the charge of transferring property to defraud creditors is totally belied by the record. At the time of the guilty plea, appellant was carefully questioned by the trial court and the following exchange took place:

> Q: [by court]: Now do you understand that no one can make any promises for the court as to how I will dispose of this case in the event either that you are found guilty by a jury or in the event that you plead guilty. Do you understand this?
>
> A: [by appellant]: I do, your honor.
>
> • • •
>
> Q: Has anyone promised you that I, as judge, will be easy on you?
>
> A: No, your honor.
>
> • • •
>
> Q: Have any promises or threats been made to induce you to plead guilty?
>
> A: Only my lawyers advise me, your honor, that in the event of this plea that a recommendation would be made by the attorney general's office by the state that in the event of a sentence it would be suspended — that would be the recommendation of the state.
>
> Q: You understand that that recommendation by the state is in no way binding upon the court?
>
> A: I understand that, your honor.
>
> • • •
>
> Q: Do you realize that as of now this court does not know how I will dispose of this case in the event that you plead guilty? Do you understand that?
>
> A: I do, your honor.

Appellant's own statements before the trial court establish that the claim of breach of warranty is totally without merit. Appellant has argued, however, that his responses above were false and that he was told to so lie in order that the guilty plea be accepted and the promised sentence rendered. If this were true, appellant would still not be able to prevail. *Cf., Kansas City Operating Corporation v. Durwood*, 278 F.2d 354, 357 (8th Cir. 1960) ("* * * anyone who engages in a fraudulent scheme forfeits all right to protection, either at law or in equity."); 74 Am.Jur.2d Torts § 46.

Appellant has failed to adduce sufficient evidence to prove a prima facie case on either claim. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX "B"

Filed August 11, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civil No. 75-5076

MORRIS B. MYERS,

Plaintiff,

vs.

JOSEPH M. BUTLER AND
ELLSWORTH E. EVANS,

Defendants.

JUDGMENT

The above entitled action came on for trial before the Court and a jury, and the plaintiff having rested, the defendants moved the Court for a directed verdict in favor of the defendants and against the plaintiff.

The motion is granted.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by this action, that the action be and it is hereby dismissed on the merits, and that the defendants, Joseph M. Butler and Ellsworth E. Evans, recover of the plaintiff, Morris B. Myers, their costs in this action to be fixed and assessed by the Clerk of this Court.

Dated at Rapid City, South Dakota, this 11th day of August, A.D. 1976.

RONALD N. DAVIES
Senior United States District Judge
(Sitting by Designation)

ATTEST:
WILLIAM J. SRSTKA, Clerk
By JANET M. HANSEN, Deputy

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

No. 76-1903

MORRIS B. MYERS,

Appellant,

vs.

JOSEPH M. BUTLER, ET AL.,

Appellees.

Appeal from the United States District Court for the District of South Dakota

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Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 28, 1977

APPENDIX "D"

PLEA BARGAINING

Of all those adversary practices the state may summon, one of the most disreputable is perhaps that "combination of duress and trickery" known officially as plea bargaining, and unofficially as "copping a plea." Plea bargaining is held necessary to speed the backlog jamming our courts. Without it, "the courts couldn't function for a day." (A Superior Court judge comments, "The trial courts are obsessed with backlog. You never see much about justice.") Indeed, the plea bargaining concludes over 90 percent of criminal cases in the United States, but *without that trial* our Constitution supposedly guarantees.

In plea bargaining, the prosecutor may multiply charges by breaking up what is essentially a single accusation into numerous parts, and charging each as a separate offense. Or he may add conspiracy counts. Or he may overcharge: perhaps charging felony (entailing sentences from a year to life) when only a misdemeanor (with maximum sentences of less than a year) would actually hold up in court. The defendant, overwhelmed by the mushroomed threat against him, is (even if innocent) thereby coerced into settling as follows: If he will forgo his right to trial by pleading guilty to one charge of the many, or to the lesser misdemeanor — the prosecutor will drop the rest.

Once such bargain is privately struck between the attorneys, usually with the Court's collusion, the accused, his lawyer, and the prosecutor stand before the Bench. (In the federal courts, the promise which has elicited the plea must be on the public record.) Here the three truth seekers join in requiring from the defendant some variation upon the following well-rehearsed litany:

> **PROSECUTOR: "Have you received your attorney's advice in this matter?"**

ACCUSED: "Yes."

PROSECUTOR: "Do you understand that you have a right to trial by jury?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand you have a right to take the stand in your own defense?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand you have a right to cross-examine witnesses against you?"

ACCUSED: "Yes."

PROSECUTOR: "Do you voluntarily give up all these rights?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand that you have a right against self-incrimination, and that by pleading guilty you are incriminating yourself?"

ACCUSED: "Yes."

PROSECUTOR: "Has anyone made any promises to you, to induce you to make this plea?"

ACCUSED: "No."

PROSECUTOR: "Has anyone threatened you or anyone near and dear to you to make this guilty plea?"

ACCUSED: "No."

PROSECUTOR: "Are you entering this plea freely and voluntarily?"

ACCUSED: "Yes."

PROSECUTOR: "With no promises made to you?"

ACCUSED: "Yes."

PROSECUTOR: "Did you in fact do this act with which you are charged?"

ACCUSED: "Yes."

PROSECUTOR: "How do you now plead?"

ACCUSED: "Guilty."

Under the thumbscrews of the Inquisition, such result was called voluntary confession. It still is.

Nonetheless, with this obligatory recital before an augustly approving Bench and a busily recording court reporter (so that everything is clear and above board and absolutely unappealable) the case is concluded. Practically everyone is happy. The state has saved itself money. The defense attorney has been paid for doing nothing. The prosecutor has spared himself the work of putting a case together — plus the risk of losing if it went to trial. Police departments and mayors' offices add one more statistic to their swelling conviction graphs. The guilty come out ahead.

Only the innocent lose — together with all the rest of us. For under plea bargaining, the innocent always receive punishment without warrant, while the guilty receive less than the law, applied, would require. Even the most vicious killer may, through that means, return to our streets in less than four years. In California recently, a first-degree murderer plea-bargained his way into an even softer sentence. The killer admitted to firing seven bullets into his victim's head and stuffing the body into a car trunk. He was eligible for parole within six months.

As the plea bargaining serves the violent criminal well, equally well does it serve the influential civil criminal, to whom it may grant a stunning leniency. It was so used

with bargain-basement abandon in the Watergate prosecutions. There those entrusted with law and order at the highest level got off —at worst — with lighter sentences than an auto thief might expect. Former United States Attorney Richard G. Kleindienst, for example, who admitted to having been "less than candid" under oath to Congress, was charged not with perjury but with a misdemeanor. He received (together with judicial praise for the "too loyal heart" which had prompted his lie) one month in jail plus a $100 fine — both suspended.

APPENDIX "E"

(Excerpted from transcript of testimony of Dennis Christensen, Vice-President, Farmers and Merchants Bank, Aberdeen, South Dakota, witness for the state in its case in chief; and Trial Exhibit 2)

Transcript, page 53, lines 17-25; Transcript, page 54, lines 1-8:

Q. • • • You indicated that he had signed a promissory note?

A. That is right.

Q. I show you what has been marked for identification as Exhibit 2, and ask you if you can identify that?

A. This is a promissory note signed by Morris Myers on January 8, 1970.

Q. Is that the copy of the promissory note you are talking about?

A. Yes, it is.

(Exhibit 2 received in evidence.)

Transcript, page 55, lines 14-25; Transcript 56, lines 1-17:

Q. Is that your handwriting on that promissory note, Exhibit 2?

A. Yes, it is.

Q. Did you make out the note at that time in that amount?

A. Yes, I did.

Q. What, if you know, was done with the proceeds of that note?

A. The proceeds of the note were deposited to Mr. Myers' account.

Q. Showing you what has been marked as Exhibit 3, I ask you to take a look at that and tell the court and jury, please, if you can identify that?

A. That is a copy of the bank statement or ledger account, showing deposits and withdrawals on the checking account.

Q. What is a ledger statement for a checking account?

A. It is the bank statement that the customer receives, and which the bank retains a copy of, the original.

Q. It shows the deposits made and the withdrawals against that account?

A. Yes.

Q. With the resulting balance?

A. Yes.

Q. And the ending date on that is January 14, 1970?

A. Yes, it is.

Q. Now the results of that promissory note of $4035.60, does that Exhibit 3 indicate if that was deposited in that account?

A. Yes, it was, on January 9, 1970.

Transcript, page 63, lines 4-13 (cross-examination):

Q. After you had done this, you loaned Mr. Myers $4035.60?

A. Yes.

Q. You had his promissory note for that amount?

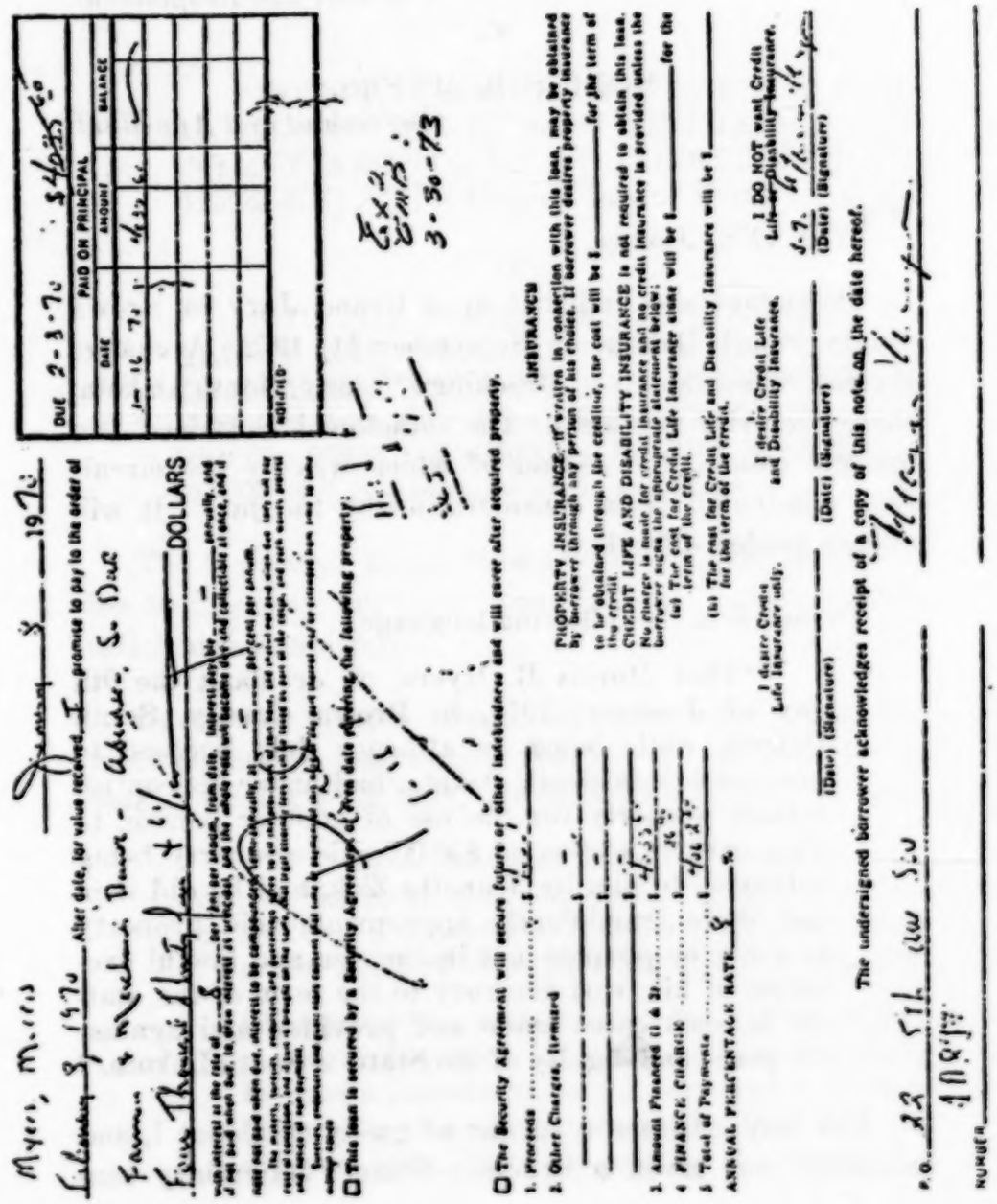
A. Yes.

Q. Legally, if he had died in the next minute, he owed you that much money, didn't he?

A. Yes.

Q. You put the proceeds of that note in Morris Myers' account, is that correct?

A. Yes.



APPENDIX "F"

SUPREME COURT OF SOUTH DAKOTA.

August 2, 1974.

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,
v.
MORRIS B. MYERS,
Defendant and Appellant.

WINANS, Justice.

Defendant was indicted by a Grand Jury in Brown County, South Dakota on September 11, 1972. A change of venue was granted to Brookings County, South Dakota, where the trial was held. The indictment contained two separate counts, the second of which was by the circuit court eliminated from consideration by the jury. It will not be considered further.

Count I is in the following language:

> "That Morris B. Myers, on or about the 9th day of January, 1970, in Brown County, South Dakota, while being an attorney duly licensed to practice law in South Dakota, had under his control certain property for the use of another person, to wit: cash in excess of $50.00, said property being entrusted to him by Jeanette Zick, and he did then and there fraudulently appropriate said property to a use or purpose not in the due and lawful execution of his trust contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

The jury returned a verdict of guilty on Count I, and defendant was given a two-year State Penitentiary sen-

tence by the court. The defendant appeals under numerous assignments of error, but in his brief on appeal eliminates all except two questions which are covered by the assignments as herein numbered.

The defendant presents such questions as follows:

> "I
>
> "DOES THE RECORD SUPPORT THE CONVICTION OF DEFENDANT OF THE ACT AND INTENT NECESSARY TO CONSTITUTE EMBEZZLEMENT? (Assignments of Error I and IV)
>
> "II
>
> "DID THE COURT ERR IN REFUSING TO ALLOW THE DEFENDANT TO TESTIFY AS TO THE REASONS WHY HE BELIEVED HE HAD THE RIGHT TO CASH THE BONDS AND PLACE THE PROCEEDS IN HIS BANK ACCOUNT? (Assignment of Error II)"

The key words in the first question presented for review by this court are "act" and "intent." Is the evidence sufficient in this regard?

Our review must be considered under some well known principles hereto announced by this court. In the case of *State v. Henry,* 1973, S.D., 210 N.W.2d 169, 171, we held:

> "• • • As a reviewing court we must view the evidence in light most favorable to the state on appeal from a conviction. This court held in *State v. Geelan,* 1963, 80 S.D. 135, 120 N.W.2d 533, 536:
>
> > 'Accepting the state's evidence and indulging the most favorable inferences which can fairly be drawn therefrom, as the jury had a right to do, we have no hesitancy in holding that the evidence is sufficient to sustain the verdict.'

The North Dakota Supreme Court has so held in *State v. Moe,* 1967, 151 N.W. 2d 310."

[1] The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury. Here there are two different versions of those acts. The State gave its version and the defendant gave his. It appears the jury accepted that given by the State and rejected that by the defendant. This court in *State v. Olson,* 1968, 83 S.D. 493, 161 N.W.2d 858, has held:

> "The facts were for the jury and this court will not disturb the verdict unless the evidence as a matter of law is insufficient to justify the jury finding defendant guilty."

[2, 3] The credibility of witnesses and weighing the evidence is for the jury. *State v. Burtts,* 81 S.D. 150, 132 N.W.2d 209; *State v. Buffalo Chief,* 83 S.D. 131, 155 N.W.2d 914. In the recent case of *State v. Hanson,* 1974, S.D., 215 N.W.2d 130, quoting from an earlier case, we said:

> " 'When the state has introduced evidence upon which, if believed by a jury, they may reasonably find the defendant guilty of the crime charged, the state has made out a prima facie case, and the jury, not the judge, ought to pass upon it.'

The jury heard the evidence as offered by the state and the evidence offered in support of appellant's defense. As indicated above, the trial court permitted wide leeway in letting appellant develop his defense. His defense was also fully covered by the court's instructions. Thus the question of appellant's guilt or innocence was fairly and fully submitted to the jury. It is well established by de-

cisions of this Court that 'The jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence.' "

It would extend this opinion beyond reasonable length to review the evidence fully herein, so we will briefly summarize.

The parties in a divorce action, Mr. and Mrs. Zick, called on Mr. Myers to get the divorce. The husband was to pay for the legal services, and defendant Myers was to get the divorce for Mrs. Zick. Certain United States Savings Bonds, property of Mrs. Zick, registered in the names of Herman Weismantel, P.O.D. Mrs. Jeanette Zick, were discussed. The defendant told Mrs. Zick that the value of the bonds would bring a better rate of interest if they were cashed and invested in something else. Mrs. Zick was requested by defendant to endorse the bonds, which she did. The defendant then took the bonds so endorsed to a local bank for redemption, and the bank sent them in to the Federal Reserve Bank. The defendant on the strength of the bonds and his personal note borrowed from the bank the amount of the redemption value in the sum of $4,035.60 which he deposited in his own personal account. The defendant gave his personal note to the bank. He told the banker that he needed the money that day so that he could give the money to Mrs. Zick because of her financial condition. Defendant asked the banker if he could borrow the money, then when the proceeds were received, to apply "those against the note to pay it off." This is what was done, and when the proceeds of the redeemed bonds were returned to the bank, the note signed by defendant was canceled as paid in full. The bank endorsed the check from the treasurer of the United States with a credit and guaranteed the endorsement. It was not endorsed by Mrs. Zick.

The defense is that when Mrs. Zick came to defendant he went over her papers among which were the bonds. He discussed with her the needs of the family and suggested cashing the bonds and using the proceeds in some investment yielding a high rate of interest. Defendant stated that there was an individual named Roberts who owned a piece of property which he had sold by contract for deed, and that Mr. Roberts also owed defendant money. The contract for deed was paying an 8% return on the balance due along with monthly payments. Defendant claims he informed Mrs. Zick that the contract was a sound investment, and that it would provide monthly payments for her to apply against living expenses and it would increase her income up to a level with her other income, which would support her and her children. Defendant testified that Mrs. Zick and defendant discussed the matter of the difference in the interest rates, and that she would be receiving a two and a half to three percent increase. Mrs. Zick agreed to take it. To accomplish this end defendant drafted a deed to the property from Roberts to Mrs. Zick which was executed by Roberts. Defendant never gave her the deed from Roberts, but he claimed he had informed Mrs. Zick of its existence.

It was Mrs. Zick's testimony that she discharged defendant as her attorney the end of February or first part of March 1970, and it was not until some time in April 1970, and after she had discharged him, when defendant first told her the bonds had been cashed "but he didn't have time to go into what they had been invested in." This was the first time she had been informed they had been cashed. It was not until August 1970 that defendant paid the proceeds of bonds over to her new lawyer, less $617.50 for attorney fees for services rendered by him in the case of Zick v. Zick. The statement dates from December 30, 1969 to March 2, 1970. The remittance from defendant to

Mrs. Zick's new attorney is in the amount of $3,418.10. Mrs. Zick received her divorce through the services of her new attorney.

We have given but the skeletal outline of the claims made in the case. The stories told in court by Mrs. Zick and the defendant were conflicting, and also the banker's testimony was damaging to the defendant. It was for the jury to search out the truth.

The appellant under question I of his appeal has listed as foundation for such question his assignments I and IV. Assignment I is as follows:

> "The Court erred in overruling the objection of the defendant to introduction of any evidence under the indictment for the reason that the indictment failed to state a public offense or charge a violation of any law of the State of South Dakota."

The law which defendant is charged with violating is SDCL 22-38-3, supra, and reads as follows:

> "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

At the beginning of the case defendant's attorney made the following objection:

> "Before any testimony is taken, the defendant objects to the introduction of any evidence on the part of the State for the reason and on the grounds that the indictment fails to state a public offense

or charge of violation of any laws of the State of South Dakota, and in fact, I point out to the court that the indictment fails to allege the ownership of the money and fails to allege the name of the person against whom the offense was committed; that being wholly as required by the statute. And for the record, that is SDCL 23-32-5."

SDCL 23-32-5 reads as follows:

"The indictment or information must be direct and certain as it regards:

(1) The party charged;

(2) The offense charged;

(3) The name of the thing or person upon or against who the offense was committed."

[4] The court overruled this objection, and we believe correctly. The indictment stated that the person who had entrusted the money to the defendant was Jeanette Zick, and it sets forth the facts done by defendant upon which he was being charged.

In *State v. Blue Fox Bar, Inc.*, 1964, 80 S.D. 565, 128 N.W.2d 561, 563, we stated the rule to be:

"The test of the sufficiency of an information under these provisions is whether it apprises a defendant with reasonable certainty of the nature of the accusation against him so that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *State v. Sinnott*, 72 S.D. 100, 30 N.W.2d 455; *State v. Wood*, 77 S.D. 120, 86 N.W.2d 530; *State v. Belt*, 79 S.D. 324, 111 N.W.2d 588."

See also *State v. Henry*, 210 N.W.2d 169, *supra*, at pages 173, 174.

Assignment IV under question I reads as follows:

"The Court erred in denying the defendant's motion for a directed verdict of acquittal for all the reasons stated in the motion for directed verdict of acquittal made at the close of all of the evidence."

[5] The motion made at the close of all the testimony is a long one which we will not set forth at length. We reiterate this, however, the evidence was conflicting. If Mrs. Zick was correct in her testimony, if the banker was correct in his, then the defendant was wrong in certain crucial aspects of his. There was at least a prima facie case made by the state "and the jury, not the judge, ought to pass upon it."

The word "intent" used in question I by appellant is also closely connected with question II heretofore set forth and hereinafter discussed. The court used the word "intent" in a number of his instructions to the jury and then in instruction 9 gave guidance to the jury how "intent" is found in the context of the case. No objection was made, and we believe the instruction expressed the correct law.

[6] Point II or Question II by appellant brings up a ruling by the trial court refusing to allow the defendant to testify why he in good faith believed he had the right to cash the bonds and place the proceeds in his bank account. This defense is specifically authorized by SDCL 22-38-10 which provides as follows:

"Upon any trial for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly and under a claim of title preferred in good faith even though such claim is untenable. But this provision shall not excuse the retention of the property of another to offset or pay a demand held against him."

This assignment is predicated upon the offer of proof which was made by the defendant at the trial. It is predicated on the following questions and answers:

"Q. Mr. Myers, did you believe, when you completed this transaction over at the bank, and the banker put the money in your account, did you believe that you had the right to do that?

A. Yes, I did.

• • • •

would you state why you believed you had the right to do it?

A. I was authorized by Mrs. Zick when she signed the bonds.

Q. Did you continue to believe that you had that right, up to and after you completed the deal?

A. Certainly.

BY MR. BUTLER: Now I would just like to point out to the court that this offer of proof is based on SDCL 22-38-10.

• • • •

BY THE COURT: Well, it seems to me that it is a self-serving statement as to what he believed. The testimony here is that she endorsed the bonds and he received the proceeds which were put into his checking account.

Well, I am going to permit the answer to that first question, that he believed he had a right to put that in his account. That is as far as we will go with it. That is the one that was stricken out."

The jury was returned and the court had the reporter read the first question of the three asked, and the answer to it, to the jury. This limits the error, if any, to questions two and three and their answers.

The contention of defendant is stated as follows:

"The state of mind of the Defendant was clearly a material issue in this case under SDCL 22-38-10. Denying him the right to explain his actions was highly prejudicial. The Court submitted the issue of the Defendant's good faith to the jury in the instructions, but yet denied him the right to state to the jury what his state of mind was and his reasons therefor. This clearly was prejudicial error."

We believe the court was clearly wrong in his denial of the last two questions and the answers. *Warner v. Hopkins,* 42 S.D. 613, 176 N.W. 746; *State v. Holter,* 30 S. D. 353, 138 N.W. 953; Wigmore on Evidence, 3rd Ed., § 581, pp. 714 and 715.

The question we have here, however, is whether the error of the court was prejudicial to the substantial rights of the defendant. SDCL 23-1-2. We hold it is not.

In *State v. Reddington,* 80 S.D. 390, 125 N.W.2d 58, we held:

"There is no definite rule by which to measure prejudicial error and each case must be decided on its own facts."

In a definition of prejudicial error we have said:

"Prejudicial error is such error as in all probability must have produced some effect upon the final result of the trial, namely, the verdict of the jury." *State v. Pirkey,* 24 S.D. 533, 124 N.W. 713.

An examination of the whole testimony of the defendant shows that it is replete with questions and answers of similar content and importance to the defendant's contention. Actually there is nothing in the offer of proof that wasn't fully and completely before the jury by the

evidence of the defendant himself. We hold that the denial of the two questions together with their answers in the offer of proof was simply not prejudicial under the circumstances. It added nothing to his previous testimony and a reversal on this error would be to exalt form over substance. The defendant had a fair trial.

The judgment is affirmed.

DOYLE, J., and RENTTO, Retired Judge, concur.

BIEGELMEIER, C. J., concurs by opinion.

DUNN, J., concurs specially.

RENTTO, Retired Judge, sitting for WOLLMAN, J., disqualified.

BIEGELMEIER, Chief Justice (concurring).

As the last paragraph of the opinion states and the record shows, the two questions called for evidence given by the witness in his prior testimony; consequently, they were repetitious and cumulative, and the court did not err in sustaining the objection to them.*

DUNN, Justice (concurring specially).

I would concur in affirming the decision of the trial court under the facts of this case. I believe, however, that

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*Some of the evidence of the haste and unorthodox method by which Mrs. Zick lost her "E" bonds shows that she did not sign the "E" bonds in the presence of the Assistant Vice President of the bank or state to him that she did sign them, yet he certified that she "signed the above request in [his] presence." The check in payment of these bonds was made payable to Mrs. Jeanette Zick. The undisputed evidence also shows it was credited to the account of Morris Myers; however, the endorsement states that it was credited to the account of the "payee," Mrs. Zick. The banker did this because he "trusted" defendant, and his representations and urgings of haste were evidence of the defendant's intent to obtain the proceeds of the bonds for his own use.

a word of caution is in order as to the implications of this decision.

The intermingling of a client's funds with his own by an attorney is a serious breach of trust and has always been frowned on by the legal fraternity. I am sure that most attorneys have trust accounts for their clients' funds, but to those few who don't I would state that this charge of embezzlement should be a red alert; a trust account for clients' funds becomes imperative; and, further, personal bills best not be paid out of that trust account. At some place the commingling of client's funds with one's own becomes embezzlement. If personal checks are written by the attorney on an account containing client's funds, this is sufficient to show appropriation under the broad language of SDCL 22-38-3 as interpreted in this decision. This leaves the issue of "fraudulent intent" which generally must be proved by implication from the facts surrounding the case. The circumstances in this case are flagrant enough to leave little doubt that this issue was properly submitted to the jury for resolution. The question left unanswered is — at what stage do the circumstances surrounding the commingly of funds make out a prima facie case of embezzlement for submission to a jury?